No. 84-559 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PERALTA SHIPPING CORPORATION,

Petitioner,

—against—

SMITH & JOHNSON (SHIPPING) CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Smith & Johnson (Shipping) Corp., respectfully prays that the Court dismiss the petition for a Writ of Certiorari herein, for the following reasons:

1. **There is no conflict among the Circuits with respect to the matters at issue, since the cases relied upon by petitioner can readily be distinguished from the instant action.**

Petitioner contends that the opinion of the Second Circuit in this case is in conflict with the decisions of the Ninth Circuit in *Hinkins Steamship Agency, Inc.* v. *Freighters, Inc.*, 498 F. 2d 411 (1974) and of the Fifth Circuit in *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697 (1961). Each of these cases can be distinguished from the instant action. *Hadjipateras* was a suit by the owners of a vessel against her managing agent for breach of a contract under which "the managing agent was to *operate the vessel,* obtain freight or freight engagements, collect the freight monies and, *after deducting all operating expenses,* remit the balance to the owners." *Hadjipateras* v. *Pacifica S.A., supra* at p. 700 [emphasis supplied]. One cannot dispute that such a contract is readily distinguishable from one between the general agent and a sub-agent for a *steamship company,* such as the agreement at issue here, in which the sub-agent is to perform services for the company and the vessels that the company operates, rather than become involved in the operation of a specific vessel.

Similarly, *Hinkins* involved an agreement to husband a particular ship for one call at one port. In finding that the contractual agreement was maritime in nature, the Ninth Circuit Court of Appeals distinguished the case of *P.D. Marchessini & Co.* v. *Pacific Marine Corp.*, 227 F. Supp. 17 (S.D.N.Y., 1964), on the ground that it "involved [a] general continuing agency agreement held to be non-maritime in nature." *Hinkins Steamship Agency, Inc.* v. *Freighters, Inc., supra* at p. 412. *Marchessini*

was the case relied upon by the District Court in dismissing the complaint in the instant action (Petition, A-14).

2. There is no compelling necessity, either under the Constitution or for reasons of public policy, for this Court to overrule *Minturn* v. *Maynard*.

Petitioner takes the position that the decision in *Minturn* v. *Maynard*, 58 U.S. (17 How.) 477 (1854) is an "anachronism", irrelevant to the needs of the maritime industry in this day and age. It is respectfully submitted, however, that to overrule *Minturn* would be to burden the already overloaded dockets of the Federal Court system with a category of cases that would have absolutely no need for—or right to—the remedies available under the admiralty jurisdiction. An agent suing a sub-agent for breach of an agency agreement cannot seriously contend that it has an enforceable maritime lien against any vessel serviced by the sub-agent, and any rights under such an agreement surely will be as well-protected by the courts of any State as by the Federal courts, should the predicate for diversity jurisdiction not be present. There is nothing uniquely maritime in character about agency or sub-agency agreements, simply because they speak of services rendered to ships, 1 Benedict, *Admiralty*, pp. 11-7, 11-8, 11-34 (7th Ed., 1981).

This Court has historically granted certiorari to lower tribunals only to consider important, novel or recurring questions of law. Thus, in *Kossick* v. *United Fruit Co.*, 305 U.S. 731 (1961), the Court considered a suit by an injured seaman to enforce an oral agreement by a shipowner to assume responsibility for his improper or inadequate treatment at a Public Health Service hospital, in consideration of his foregoing private treatment. Under the applicable State law, the oral contract was unenforceable. The Court, noting that oral contracts were recognized in admiralty, held that the plaintiff's claim fell within the Federal maritime jurisdiction—the only jurisdiction in which relief was available to him. In contrast, the petitioner herein is in

no way barred from pursuing his remedies in the courts of New York State.

In *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), this Court stated, "We are not inclined at this juncture to disturb the existing precedents and to extend shoreward the reach of the maritime law further than Congress has approved." *Id.* at p. 211. While this opinion was concerned with a tort action, we believe that the principle stated is equally applicable to contractual disputes, such as the instant case, which do not give rise to critical questions of public policy, restraint of commerce or other constitutional considerations, and which do not constitute such novel or recurring issues so as to justify the overruling of a precedent that has endured for one hundred and thirty years. If the law is to be changed, then let Congress change it.

At a time when considerable thought is being given to limiting the diversity jurisdiction of the Federal Courts, or even eliminating it altogether, it would be counterproductive for this Court to diminish the anticipated benefit of such a limitation by unnecessarily broadening the admiralty jurisdiction of the same Courts.

Conclusion

Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully Submitted,

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